In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1315

MOTOWN RECORD CORPORATION,
Petitioner,

vs.

JACK SOLINGER,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner, Motown Record Corporation, respectfully prays that this Court issue its writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, filed in this proceeding on November 27, 1978.

OPINION BELOW

The opinion of the Court of Appeals, reported at 586 F.2d 1304, is reprinted in the Appendix. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 27, 1978. This petition for certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is the mere "foreseeability" of an antitrust injury sufficient to meet the statutory requirement of injury "by reason of" an antitrust violation?

2. Does a plaintiff, who has no business or property in the area of competition allegedly restrained, have standing to maintain a private antitrust action, based solely on his claim of "intention and preparedness" to enter the market?

STATUTORY PROVISION INVOLVED

Section 4 of the Clayton Act (15 U.S.C. § 15):

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

In 1974, respondent brought suit in the Northern District of California against various defendants, alleging violations of sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act (15 U.S.C. §§ 1, 2, and 18) and seeking treble damages of $10,500,000. (R. 10.) In late 1975 he added petitioner as an additional defendant.

Respondent claims that petitioner and another defendant, as phonograph record producers, refused to deal with him in violation of sections 1 and 2 of the Sherman Act. (15 U.S.C. §§ 1, 2.) In broad language, the complaint alleges a combination and conspiracy and an attempt to monopolize. Independent Music Sales ("IMS") was a dealer in phonograph records, and respondent was its general manager. Petitioner allegedly boycotted respondent and IMS, took various steps to allocate territories among its distributors, spread false rumors about IMS and plaintiff, and created a monopoly "in the independent distribution" of its own records. By these acts, it is claimed, petitioner and others "prevented plaintiff from acquiring [IMS] and put [IMS] out of business," thereby damaging respondent in the trebled sum of $10,500,000. (R. 9.) On the same facts, the complaint avers a state law claim for unfair competition against petitioner and others. The complaint also alleges that other defendants violated section 7 of the Clayton Act. (15 U.S.C. § 18.)

Petitioner moved to dismiss, contending the complaint showed on its face that respondent lacked standing to maintain this action since he had no "business or property" committed to the area of competition—the wholesale distribution of popular-music records and tape recordings—allegedly restrained by defendants, and that being outside the market allegedly restrained he could claim no injury "by reason of" the claimed violations. Both quotations state statutory requirements for maintenance of private antitrust actions under section 4 of the Clayton Act (15 U.S.C. § 15).

In response to the motion, respondent supplemented his complaint by affidavit. The district court granted petitioner's motion and dismissed the action on the ground that

respondent could not state a claim on which relief could be granted.[1]

On respondent's appeal to the Ninth Circuit Court of Appeals, the judgment of the District Court was affirmed as to the dismissal of the section 7 claim, but reversed and remanded as to the Sherman Act claims. (App. 14.)

Petitioner timely filed this petition.

STATEMENT OF FACTS

Respondent had been employed as the chief executive officer of Independent Music Sales, Inc. ("IMS"), which distributed popular-music records and tapes in Northern California. (R. 3-5.) Respondent negotiated with IMS' owner for sale of the business to a new corporation which respondent intended to form. (See R. 264.) A contract to purchase and sell the business had been drafted, and respondent had obtained financing. At this point, respondent alleges, he contacted petitioner and another defendant, both popular-music record and tape manufacturers, and allegedly "the top companies which distributed their product through independent distributors." (R. 5.) He asked the two companies if they would sell to his proposed new business. They refused to do so. (App. 3.) Respondent then decided not to form the new corporation, not to have the new corporation enter into the proposed contract to purchase IMS' assets, and not to become the proprietor of a record distribution business. Subsequently, IMS went out of business. It has not yet claimed that petitioner's or anyone else's antitrust violations were the cause of its demise.

1. The other defendants, who had previously answered, then moved for judgment on the pleadings. These motions were also granted on the basis of petitioner's arguments, and the entire action was dismissed. Respondent pursued one single appeal from the ensuing judgment of dismissal.

REASONS FOR GRANTING THE WRIT

1. A Decision by This Court on the Rights of Remote Plaintiffs to Maintain Private Antitrust Damage Claims Is Urgently Required.

The lower courts have often lamented that this Court has never spoken on the question how remote from the claimed restraint may a plaintiff be and yet maintain a private treble damage action under the antitrust laws? The law in this area is in great disarray. Different circuits, and sometimes different panels within the same circuit, apply widely divergent standards to test whether a remote plaintiff has "standing": whether he has suffered injury to "business or property . . . by reason of" an alleged antitrust violation.

Twice recently, this Court has spoken firmly on related issues. In *Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477 (1977), it held that not all damages related to antitrust violations are compensable; a plaintiff must show that his injury was caused by a violation that the antitrust laws were designed to protect against. In *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), it held that, in general, only first-tier purchasers can maintain a private antitrust action.

In this case, existing law has been stretched beyond recognition to afford standing to a person who never risked or lost a penny, but who can now freely gamble on receiving a jury verdict exceeding $10,000,000. The court of appeals' decision, which permits respondent this riskless wager, must be reversed. Moreover, this case affords a sound and clear opportunity to rationalize the law in an important, confused and much-litigated field which badly needs this court's authoritative guidance.

Since a somewhat similar issue—the right of consumers to maintain private antitrust suits—is now before the court

in *Reiter v. Sonotone Corporation*, No. 78-690, cert. granted 47 U.S. L.W. 26, this is a good time and a good case to complete the Court's work in the antitrust "standing" field.

2. That a Plaintiff Would "Foreseeably" Be Injured by an Antitrust Violation Does Not Establish He Was Injured "By Reason [There]of."

a. THE "FORESEEABILITY" TEST CONFLICTS WITH OTHER DECISIONS OF THE NINTH AND OTHER CIRCUITS.

Two years ago this Court held that injury is cognizable under the Clayton Act only if it is of the kind against which the antitrust laws were designed to protect. (*Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977).) While this Court has not considered the issue, lower courts have consistently ruled that some antitrust injuries are too remote to confer standing. Standing to sue is routinely denied employees for jobs lost due to restraints on their employers,[2] shareholders for restraints on their corporations,[3] landlords for restraints on their tenants,[4] and others. But for claims lying nearer to the restrained market, the lower courts have struggled without success to devise a test defining those interests which the antitrust laws were designed to protect, describing those plaintiffs who can assert injury "by reason of" an antitrust violation. The courts of appeal have used several different standards to

2. *E.g., Contreras v. Grower Shipper Vegetable Ass'n of Central Cal.*, 1971 Trade Cas. ¶ 73,592 (N.D. Cal. 1971), *aff'd per curiam*, 484 F.2d 1346 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974).

3. *E.g., Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292 (2d Cir. 1958); *Peter v. Western Newspaper Union*, 200 F.2d 867 (5th Cir. 1953).

4. *E.g., Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

determine whether this element of standing has been met.[5] Hitherto, the Ninth Circuit has consistently adhered to the "target area" approach. (*E.g., In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 127 (9 Cir. 1973), cert. denied, 414 U.S. 1045 (1973), and cases cited below, see App. 9-10.)

5. Experimentation with standing requirements has led to increasing disparity between the circuits. The Second, Fourth and Fifth Circuits follow the "target area" formulation. *Commerce Tankers Corp. v. National Maritime Union of America*, 553 F.2d 793, 801 (2d Cir. 1977); *Calderone Enterprises Corp. v. United Artists Theatre Circuit*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414, 418 (4th Cir. 1966), *cert. denied*, 385 U.S. 934 (1966); *Donovan Const. Co. of Minnesota v. Florida Telephone Corp.*, 564 F.2d 1191, 1192 (5th Cir. 1977), *cert. denied*, 98 S.Ct. 1878 (1978); *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1175 (5th Cir. 1977).

The Tenth Circuit adheres to the "direct injury" standard. *Farnell v. Albuquerque Publishing Co.*, No. 78-1181 (10th Cir., decided Oct. 24, 1978); *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 733 (10th Cir. 1973), *cert. denied*, 411 U.S. 938 (1972).

The Third Circuit, which developed the "direct injury" standard, now disapproves of both the "direct injury" and the "target area" approaches. It favors, instead, ". . . a balancing test comprised of many constant and variable factors . . . ." *Bravman v. Basset Furniture Industries, Inc.*, 552 F.2d 90, 99 (3d Cir. 1977), *cert. denied*, 434 U.S. 823 (1977).

The Eighth Circuit describes its standing requirement as an "injury . . . something more than remote . . . ." *Reiter v. Sonotone Corp.*, 579 F.2d 1077, 1081-82 fn. 9 (8th Cir. 1978), *cert. granted* on another issue, No. 78-690, 47 U.S.L.W. 26 (Jan. 9, 1979).

The District of Columbia Circuit requires a "causal connection between the injury and the defendant's allegedly illegal acts." *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 987 (D.C. Cir. 1977), *cert. denied*, 98 S.Ct. 3069 (1978).

The Seventh Circuit is without a standard. It had adopted the Sixth Circuit's "zone of interest" approach expressed in *Malamud v. Sinclair Oil Co.*, 521 F.2d 1142, 1151 (6th Cir. 1975) but now doubts that the *Malamud* approach survives this Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *Lupia v. Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1169 (7th Cir. 1978).

As the opinion below recognizes, the Ninth Circuit has used the "target area" test both with and without a "foreseeability" component (App. 11, n.6). The present opinion recites past "target area" cases from the Ninth Circuit but limits its analysis to foreseeability. (App. 14, n.9.)

In this case, the Ninth Circuit declared for the first time that where the offense charged is a violation of sections 1 or 2 of the Sherman Act, the "target area" test requires no more than that the plaintiff show he is "within the area of the economy that the defendants *should have foreseen would be affected* by their violation of the antitrust laws, if any."[6] (App. 11-12; emphasis supplied.) Although it offered a recital of some prior "pure" target area cases, the court admitted its opinion here creates another new test for standing:

> Because a party other than a competitor who alleged a section 1 or 2 violation may be within the area of the economy that the antitrust laws are designed to protect, this court has formulated another test for standing. As discussed in this opinion, the test is foreseeability. (App. 14, n.9.)

This "foreseeability" test now embraced by the Ninth Circuit has previously been expressly rejected by the Second Circuit. (*Calderone Enterprises Corp. v. United Artists Theatre Circuit*, 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930; *Long Island Lighting Co. v. Standard Oil Co. of California*, 521 F.2d 1269 (2d Cir. 1975).) In *Calderone Enterprises* the dissenting judge argued that the proper

6. Foreseeability, as part of the "target area" test, appears sporadically in prior Ninth Circuit decisions. Compare *Blankenship v. Hearst Corp.*, 519 F.2d 418, 426 (9th Cir. 1975), and *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 109, 220 (9th Cir. 1964), *cert. denied*, 379 U.S. 880 (1964) [target area is that area of economy foreseeably affected] with *Bosse v. Crowell Collier and Macmillan*, 565 F.2d 602, 606 (9th Cir. 1977) and *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 128 (9th Cir. Cir. 1973), *cert. denied*, 414 U.S. 1045 (1973) [foreseeable plaintiffs denied standing]. *Cf. Contreras v. Grower Shipper Vegetable Ass'n. of Central Cal.*, 1971 Trade Cas. ¶ 73,592 (N.D. Cal. 1971), *aff'd per curiam* 484 F.2d 1346 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974) [injury to plaintiffs a logical but not necessary result of conduct: standing denied].

standard was "whether plaintiff would be in the reasonably foreseeable area to be affected by the antitrust violation." (454 F.2d at 1300.) The majority expressly addressed and rejected the "foreseeability" test urged by the dissent. (454 F.2d at 1296 n. 2.) Four years later in *Long Island Lighting Company* the Second Circuit reiterated its rejection of a "foreseeability" test, stating that under the target area doctrine as interpreted and applied in the Second Circuit "even parties whose injuries may be both immediate and foreseeable may lack standing to pursue a private remedy." (521 F.2d at 1274.)[7] The court expressly found that the injury sustained by the plaintiff was "foreseeable" but nonetheless denied recovery for lack of standing. (*Id.*)

The vast potential scope of so vague a standard as "foreseeability" has been aptly characterized by the Second Circuit:

> [T]he "foreseeability" test urged by the dissent would permit anyone to sue, regardless of how distant his interest or relationship (including a customer of a competitor's customer, or a supplier to a supplier dealing with an alleged conspirator), since it would be difficult to disprove the fact that remote economic repercussions in the line of distribution result from almost every antitrust violation. (*Calderone Enterprises Corp. v. United Artists Theatre Circuit, supra*, 454 F.2d 1292, 1296, n.2.)

As the *Calderone* court also noted, damage to "remotely situated persons" is much harder to assess:

> [T]heir damage is usually much more speculative and difficult to prove than that of a competitor who is an immediate victim of the violation. (*Id.* at 1295.)

7. The chaotic status of the standing doctrine in the lower courts is emphasized by the fact that, despite the proliferation of labels for the various approaches to analyzing standing, both this case and the diametrically opposed Second Circuit cases claim to apply the "target area" doctrine.

Finally, the "foreseeability" test opens the "floodgates ... to permit treble damage suits by every creditor stockholder, employee, subcontractor or supplier of goods and services that might be affected." (*Id.*) The result, as prophesied by the Second Circuit, will be:

> [O]ver-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress. If the antitrust laws were precise and crystallized something might be said in favor of such an enormous expansion of potential treble damage liability, speculative as the damages might be. But the fact remains that because there are few "bright lines" in the area, even experts who have devoted their entire professional lives to the practice of antitrust law often find it impossible to advise a client with any degree of certainty whether his contemplated conduct will transgress lawful bounds. (*Id.*)

Both the courts[8] and the commentators[9] have expressed dismay at the confusion and conflict among lower court

8. See *e.g.*, *Wobb v. Ford Motor Co.*, 76 F.R.D. 452, 456, n.2 (W.D. Pa. 1977) ["The perplexing question of who is entitled to sue under the antitrust laws, never being definitely addressed by the Supreme Court, has led to inconsistent lower federal court opinions."]; *Wilson v. Ringsby Truck Lines, Inc.*, 320 F.Supp. 699, 701 (D. Colo. 1970) ["We must confess at the outset that we find antitrust standing cases more than a little confusing and certainly beyond our powers of reconciliation."].

9. D. Berger and R. Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 840 (1977) [referring to the "decisional morass" in the standing area and noting the lack of "an analytical framework that could make order out of the chaos"]; M. Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits: The Twenty-Third Annual Antitrust Review*, 71 Colum.L.Rev. 1, 28 (1971) ["The plain fact is that the standing-to-sue cases are irreconcilable. And the case law has become increasingly confused"]; J. Beane, *Antitrust: Standing and Passing On*, 26 Baylor L.Rev. 331, 333 (1974) ["Without definitive guidance from the Supreme Court with respect to standing in antitrust matters, the circuit courts have entrenched themselves into respective camps with regard to the analysis of standing to sue. Although

decisions on antitrust standing. This case provides an ideal vehicle for this Court to provide long-needed clarity in this area.

b. THE "FORESEEABILITY" TEST WOULD VASTLY EXPAND THE CLASS OF POTENTIAL PLAINTIFFS.

In *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), this court observed with approval:

> [The] lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. (405 U.S. at 263 n.14.)

In this case, the Ninth Circuit has ended that unanimity, extending antitrust standing far beyond those "aimed at and hit" by the violation. (*Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 (9 Cir. 1955).)

common in goal, these respective approaches have substantial and marked differences in analysis"); Comment, *Standing to Sue in Antitrust: The Application of Data Processing to Private Treble Damage Actions*, 11 Tulsa Law J. 542 (1976) ["[d]espite six decades of unresolved controversy, the Supreme Court has failed to give a definitive treatment to the rigid standing requirements under section 4 of the Clayton Act"]; Note, *Standing to Sue in Private Antitrust Litigation: Circuits in Conflict*, 10 Ind.L.Rev. 532, 554 (1977) [Given the conflict in the circuits, "if the choice exists, a potential private antitrust litigant who has been in any way remotely injured would be much wiser to opt for the nonrestrictive views of the Fourth, Sixth, Seventh, Eighth, or Ninth Circuits, than for the uncertain approaches of the Fifth, Tenth, and District of Columbia Circuits. Care should be taken especially to avoid the restrictive views of the First, Second, and Third Circuits if possible"]; Comment, *Standing Under Clayton Section 4: A Proverbial Mystery*, 77 Dick. L.Rev. 73 (1972) ["The present split concerning the required causal connection between the injury and the violation is one which will continue to be a battleground for years to come. As long as the Supreme Court is content to avoid the issue of section 4 standing, the proverbial mystery will continue. Without a solution, the private claimant will be forced to gamble the high cost of antitrust litigation against the whims of the court on every section 4 action"].

The remedy this court in *Hawaii* denied persons "conceivably" injured by an antitrust violation, the Ninth Circuit has given back to those "foreseeably" damaged. What difference exists between "conceivable" and "foreseeable" is an abstraction depending on the eagerness and perspective of the observer. These concepts clearly adjoin and may largely overlap. Certainly clarity cannot be found in the concept of "foreseeability" so as to tell trial judges and litigants where, if beyond the market forces of buyers, sellers and competitors themselves, a "foreseeable" and therefore proper plaintiff becomes a merely "conceivable" and thus illicit one.

Before this case, the "target area" test was regarded as the most liberal standard for antitrust standing (see note 9, *supra*), requiring only that the plaintiff be "within the area of the economy that is endangered by a breakdown of competitive conditions." (App. 10.) Under the decision in this case, however, the plaintiff need no longer be within the endangered area; it now is sufficient that he be outside the area, merely looking in.

Virtually any person can make that claim, and endless lines of potential plaintiffs are within areas "of the economy foreseeably . . . affected by the antitrust violation alleged." (App. 10-11.) Whatever limitation the "target area" test once imposed on antitrust standing has now been casually jettisoned by the Ninth Circuit.

The foreseeability test for antitrust standing is bad law and bad policy; this court should reject such an additional layer of confusion and unpredictability in an already too confused and unpredictable area of the law.

What test should this Court announce? It is perhaps more important that the Court settle the question and announce *a* test, than that it choose a particular one of the

many available tests. However, consistent with this court's recent statement in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977) that vigorous private antitrust enforcement is best promoted by restricting private actions to those immediately and directly affected, standing should be afforded only those plaintiffs in direct business contact with one or more defendants, as competitors, buyers, or sellers. Perhaps, an exception might be made for the rare case where the violation is clear but by its nature has prevented the existence of competition—an illegal, total monopoly in violation of section 2 is a theoretical example—but almost all cases could be fully redressed under such a test of "direct business contact," and the exception may be unnecessary.

3. A Mere Prospective Purchaser of a Business Has No Standing to Sue for Antitrust Violations in the Market He Would Have Liked to Enter.

a. THE DECISION OF THE COURT BELOW THAT A MERE PROSPECTIVE PURCHASER OF A BUSINESS SUSTAINS INJURY IN HIS "BUSINESS OR PROPERTY" CONFLICTS WITH A PRIOR DECISION OF THE EIGHTH CIRCUIT.

Respondent seeks damages for the alleged destruction of a business he never owned. He has alleged no more than that he took certain preparatory steps—arranging to form a corporation, negotiating (but not consummating) contracts for purchase of the business, arranging financing, and acquiring experience in the field—which supposedly make him a "prospective purchaser." The court of appeals held that this was enough to permit him to sue. (App. 8-9.) As the court conceded, its ruling conflicts with the Eighth Circuit's decision in *Duff v. Kansas City Star Co.,* 299 F.2d 320, 323 (1962). Said the court below:

> Some courts have held that a prospective purchaser may not recover under section 4 because the amount

> of damages sustained is not sufficiently ascertainable, and thus the plaintiff has not suffered tangible injury to his business or property. E.g., *Duff v. Kansas City Star,* 299 F.2d 320, 323 (8th Cir. 1962), see generally L. Sullivan, *Handbook of the Law of Antitrust,* section 247 at 770 (1977). *We disagree, however,* and adopt the view that a prospective purchaser who has taken substantial demonstrable steps to enter an industry and who is thwarted in that purpose by antitrust violations, has suffered a possible ascertainable loss. (App. 7-8, emphasis supplied.)

In *Duff* the plaintiff, who had once owned and operated a weekly newspaper in Kansas City, was attempting to re-enter the newspaper business there. He alleged that, among other things, he "had located an office, made arrangements to have his paper printed, and took extensive samplings of the advertising market and newspaper industry at that time" (299 F.2d at 323) but was prevented from re-entering the market by the defendant's antitrust violations. The court of appeals held that plaintiff lacked standing to claim antitrust damages:

> [W]hat [plaintiff] is seeking here is damages by reason of loss of anticipated profits in an anticipated business. This he may not do. (299 F.2d at 323.)

The question of whether actual compliance with section 4's requirement of a showing of injury to plaintiff's "business" or "property" is mandated, or whether a mere "intention and preparedness" to acquire a "business" is sufficient to assert such a claim has arisen on many occasions, with inconsistent results.[10] This recurring question of the scope

10. *E.g., Hecht v. Pro-Football, Inc.,* 570 F.2d 982, 994 (D.C. Cir. 1977), cert. denied, 98 S.Ct. 3069 (1978); *Quinonez v. National Association of Securities Dealers, Inc.,* 540 F.2d 824, 830 (5th Cir. 1976); *Martin v. Phillips Petroleum Company,* 365 F.2d 629, 633 (5th Cir. 1966), cert. denied, 386 U.S. 991 (1966); *Triangle Conduit & Cable Co. v. National Electric Products Corp.,* 152 F.2d 398, 399-400 (3d Cir. 1945); *Waldron v. British Petroleum Co.,* 231 F.Supp. 72 (S.D.N.Y. 1964).

of the "business or property" requirement, as exemplified by the clear conflict here between the Eighth and Ninth Circuits, should be finally resolved by this Court.

b. A MERE PROSPECTIVE PURCHASER SHOULD NOT BE ABLE TO CLAIM ANTITRUST INJURY TO HIS "BUSINESS OR PROPERTY."

Allowing "prospective purchasers" to sue will open the courts to a host of plaintiffs, never contemplated by section 4 of the Clayton Act, who have been injured in neither their business nor their property.

The lower court's interpretation does violence to the plain language of the statute: it blinks reality to say that one who claims only that he almost bought a business can be injured in that "business." No public policy justifies such deviation from the simple statutory language. There is no reason not to read that language in the most straightforward and natural way. (*United States v. Great Northern Ry. Co.,* 343 U.S. 562 (1952); *Flora v. United States,* 357 U.S. 63 (1958); see *Coopers & Lybrand v. Livesay,* .... U.S. ...., 98 S.Ct. 2454 (1978) [holding that, where the statute expressly conditions appealability on a "final" judgment, policy arguments for an exception applicable to a particular class of non-final judgments are properly addressed to Congress].) Had Congress meant to extend the right to press treble damage actions to persons on the periphery of a "business"—such as a "prospective purchaser" of a business—it was fully competent to state that intent in words sufficient to the task.

The policy considerations that led Congress to limit the treble damage remedy to those sustaining injury in their

"business or property" are evident. Extending standing to persons, such as "prospective purchasers," with nebulous claims creates the obvious risk of multiple recoveries for the same alleged harm, a point well illustrated by this case. The risk of multiple recovery here grows out of the fact that, while one and only one business—IMS'—was "destroyed," any number of persons may claim to be "prospective purchasers" of that business. To attain standing via the "prospective purchaser" route, the decision below requires some vague mix of experience, availability of financing, and negotiations with the prospective seller. Persons selling a business commonly negotiate with several potential buyers at the same time. Each of those potential buyers is likely to have enough experience and financing to meet the court of appeals' amorphous standard. It is unnecessary to make any elaborate analysis of the unfairness of permitting such multiple recoveries for a single loss: this court has stated repeatedly that it is "unwilling to 'open the door to duplicative recoveries' under § 4." (*Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 2067 (1977), quoting from *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972).)

Furthermore, such a "prospective purchaser's" damages are inherently speculative. Pre- and post-conspiracy profits of the almost-bought business provide no sure guide to the prospective buyer's loss. There is no reason to assume the buyer will run the business as the seller does. Indeed, in this case, it appears that respondent intended to have a different capital and debt structure, different executive compensation, different fixed costs, and different marketing strategies from IMS. (See R. 243-263.) Thus, both the fact and the extent of a prospective buyer's damage is left wholly to speculation.

Finally, there is no justification for permitting those who merely come to the brink of a market but do not enter it and do not put even a nickel at risk, to recover damages as though they had actually invested and seen their investment damaged by an antitrust violation. The lower court's rule of standing encourages speculative litigation, permitting mere bystanders to roll the dice on a treble damage bonanza at no more cost than the expense of a lawsuit. In fact, under this test an outsider who knows or suspects a restraint in a particular market could make spurious gestures toward entry, just to sustain a suit.

In the absence of any suggestion that Congress wished to open the federal courts to adventures by such outsiders, nothing in the antitrust laws warrants imposing such formless and speculative claims on the federal courts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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February 23, 1979.

(Appendix follows)

Appendix A

Filed—Nov 27 1978
Emil E. Melfi, Jr. Clerk
U. S. Court of Appeals

In the United States Court of Appeals
for the Ninth Circuit

No. 76-2965

Jack Solinger,
Plaintiff-Appellant,

v.

A&M Records, Inc.; Transamerica Corp., United Artists Corp.; United Artists Records, Inc.; Eric-Mainland Distributing Co.; Musical Isle of America; Record Merchandising Company, Inc.; Jerome S. Moss; Robert Fead; Sidney Talmadge; Motown Record Corporation,
Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: BARNES, TRASK and HUG, Circuit Judges.

BARNES, Senior Circuit Judge:

This is an appeal from a district court judgment dismissing a private antitrust action brought under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and sections 4 and 7 of the Clayton Act, 15 U.S.C. §§ 15 and 18 on the ground that the plaintiff lacked standing to sue for damages under section 4 of the Clayton Act.

I

Jack Solinger, the former president and general manager of Independent Music Sales, Inc. (I.M.S.), an independent distributor of phonographic records and tape recordings, by an original and an amended complaint, sued A&M Records, Inc. (A&M) and Motown Record Corporation (Motown) for damages arising from alleged antitrust violations, including a territorial allocation scheme. Solinger in his original complaint, had sued Transamerica Corporation for violating section 7 of the Clayton Act and section 2 of the Sherman Act. He alleged that Transamerica engaged in improper corporate mergers and consolidations, stock acquisitions, and acquisitions of corporate assets. He further alleged that these acquisitions of manufacturers, including defendant United Artists, and distributors, including defendants United Artists Records, Inc., Eric-Mainland, Musical Isle of America, Record Merchandising Co., Inc., and individually named officers thereof, Moss, Fead and Talmadge, resulted in a direct lessening of competition in the record distribution industry.

Until March 1973, I.M.S. was the principal independent distributor of phonographic records and tape recordings in northern California and acted as the distributor for defendants A&M and Motown, two large manufacturers of records and tape recordings.[1] As a distributor for these companies, I.M.S. principally serviced northern California, but also sold A&M and Motown products to certain retail accounts in southern California. The latter named area, however, was primarily serviced for A&M and Motown by another distributor, Record Merchandising Company.

1. By 1973 A&M and Motown were ranked as the fourth and fifth largest record manufacturers in the popular music field.

In 1972 and 1973, Solinger negotiated on his own behalf to purchase I.M.S. from its sole shareholder, Zenith Distributing Company. He obtained financing, and negotiated both a written but unsigned purchase agreement, and a written but unsigned "Rental and Service Agreement" from Zenith. The purchase was to be made by J.N.S. Enterprises, an entity Solinger intended to create for that purpose.

Before signing the final papers, Solinger contacted both A&M and Motown to determine whether they would retain I.M.S. as their distributor after such a purchase. Both companies indicated that they would *not* retain I.M.S. Solinger contends that he did not complete the purchase of I.M.S. because I.M.S. could not survive without the A&M and Motown contracts. Shortly thereafter, both companies terminated I.M.S. as a distributor and without these two contracts, I.M.S. went out of business.

Solinger alleges that A&M and Motown refused to deal with him and with I.M.S. because, pursuant to his specific directions as president, I.M.S. had refused to comply with a territorial allocation plan established by A&M and Motown under which northern and southern California were divided into two separate territories. Solinger also alleges that after A&M and Motown terminated their distribution agreements with I.M.S., Eric-Mainland Distributing Company became the distributor for both A&M and Motown products for northern California and began to comply with a territorial allocation plan under which it would not sell A&M and Motown products in southern California.

II

The district court granted Motown's motion to dismiss Solinger's complaint (as to Motown alone) on the ground that the complaint failed to state a claim upon which

relief could be granted. Thereupon all other defendants filed similar motions. The Court filed a final judgment in favor of all defendants on June 29, 1976, stating only that "the action be, and hereby is dismissed." Although the grounds for dismissal were not stated in the order, the court indicated that "basically" the plaintiff lacked standing.[2]

Under Fed. R. Civ. P. 12(b)(6), however, if there is a motion to dismiss for failure to state a claim upon which relief can be granted, and matters outside the pleadings are presented to and not excluded but are heard by the court, the motion is to be treated as one for summary judgment and disposed of as provided in Fed. R. Civ. P. 56, and particularly 56(c) thereof. Because material outside the pleadings was presented in this case, the judgment must be held to be one for summary judgment. *Dorado v. Kerr,* 454 F.2d 892, 896 (9th Cir. 1972).

It is elementary that the district court before granting summary judgment must determine that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Baldwin v. Redwood City,* 540 F2d 1360 (9th Cir. 1976); *Great Western Bank & Trust v. Kotz,* 532 F.2d 1252, 1254 (9th 1976); *Zweig v. Hearst Corp.,* 521 F.2d 1129, 1133 (9th Cir.), *cert. denied,* 423 U.S. 1025 (1975). When no finding is made by the court specifying with particularity what material facts have been established, and without a finding that no material factual issues remain, there is no way in which a reviewing court can pass upon the merits of the controversy when the judgment is appealed. We have no power to judge the fact issue de novo. *Hycon Manufacturing Co. v. H. Koch & Sons,* 219 F.2d 353, 355 (9th Cir.), *cert. denied,* 349 U.S. 953 (1958).

Because we are required to review this case as one for summary judgment, and because the court failed to determine whether any genuine issues of material fact exist and whether the plaintiff is entitled to judgment as a matter of law, we remand part of the case to the district court for further proceedings to determine what the undisputed facts are, and that no material factual issues remain; and, if that be true, whether Solinger has standing. As discussed in the remainder of this opinion, we affirm as a matter of law the district court's determination that plaintiff does not have standing to pursue his claim under section 7 of the Clayton Act.

2. On June 25, 1978 counsel raised the question of the *form* of the orders proposed by the moving parties:

> MR. MCKENZIE [Attorney for plaintiff]: That order [presented on behalf of Transamerica Corporation, et al.] recites that the Court lacks subject matter jurisdiction over the action. I understand Your Honor's ruling today, you simply hold that we haven't brought ourselves within the standing provision, which is 15 U.S.C. § 15. I think the form of this order goes way beyond that. Therefore I don't think this is a proper form of order.
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> THE COURT: It is basically standing.
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> THE COURT: For the record it's on standing.

III

Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976) provides a private cause of action for those parties injured by antitrust violations such as the ones alleged by Solinger in his complaint: violations of sections 1 and 2 of the Sherman Act and sections 4 and 7 of the Clayton Act, 15 U.S.C. §§ 1, 2, 15 and 18. Section 4 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-

> trust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney's fee.

15 U.S.C. § 15. Despite the broad language of this provision, the parties entitled to recover under this section have been greatly limited through judicially created restrictions on standing. *See generally* L. Sullivan, *Handbook of the Law of Antitrust* § 247, at 770 (1977); Berger & Bernstein, *An Analytical Framework for Antitrust Standing,* 86 Yale L.J. 809 (1977); Lytle & Purdue, *Antitrust Target Area Under Section 4 of the Alleged Antitrust Violation,* 25 Am. U.L.Rev. 795 (1976).

In order to have standing under section 4 the plaintiff must allege nonconclusory facts establishing that there has been injury to the plaintiff's business or property and that the injury to the plaintiff's business or property occurred "by reason of" the antitrust violation. The plaintiff's claim may be dismissed for lack of standing as a matter of law, *John Lenore & Co. v. Olympia Brewing Co.,* 550 F.2d 495, 500 (9th Cir. 1977), where there is an insufficient showing of causation. However, if the plaintiff states sufficient facts to support his allegations that an antitrust violation has occurred and that he has sustained injury to his business or property, he is generally entitled to go to the jury on the violation and injury issues. These two determinations, unlike causation, are not questions of law; they are questions of fact. *See Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972), *aff'd after retrial,* 509 F.2d 784 (5th Cir.), *cert. denied,* 423 U.S. 833 (1975) (whether plaintiff is a prospective purchaser is a question of fact for the jury); *Pacific Seafarer, Inc. v. Pacific Far East Line,* 48 F.R.D. 347, 351 (D.D.C. 1969) (determination on motion to dismiss is only whether the pleadings present a triable antitrust issue and show the requisite causation).

IV

As stated above, Solinger alleges in his complaint that the defendants committed actions that violate sections 1 and 2 of the Sherman Act and sections 4 and 7 of the Clayton Act, 15 U.S.C. §§ 1, 2, 15 and 18. This Court determines that Solinger has made a sufficient showing of antitrust violations in his complaint to survive a motion to dismiss, in view of the fact that we must take the allegations of the complaint as true. Upon remand the district court should consider whether antitrust violations have occurred, whether there are genuine issues of material fact remaining, and, if not, whether either party is entitled to judgment as a matter of law.[3] We do note, however, that summary judgment is not generally considered to be an appropriate remedy in a case involving antitrust violations because such claims usually involve extensive factual determinations. *Fortner Enterprises, Inc. v. United States Steel Corp.,* 394 U.S. 495, 500 (1967).

V

To have standing, Solinger must also show that he has sustained injury to his business or property. In this case Solinger was a prospective purchaser of a business. Some courts have held that a prospective purchaser may not

3. In part VI of this opinion, we hold that plaintiff does not have standing as a matter of law to pursue his section 7 claim. It will therefore be unnecessary for the district court to determine whether summary judgment should be granted as to the section 7 violation.

recover under section 4 because the amount of damage sustained is not sufficiently ascertainable, and thus the plaintiff has not suffered tangible injury to his business or property. *E.g., Duff v. Kansas City Star Co.*, 299 F.2d 320, 323 (8th Cir. 1962), *see generally* L. Sullivan, *Handbook of the Law of Antitrust*, § 247 at 770 (1977). We disagree, however, and adopt the view that a prospective purchaser who has taken substantial demonstrable steps to enter an industry and who is thwarted in that purpose by antitrust violations, has suffered a possible ascertainable loss.

In making its determination whether the plaintiff is a prospective purchaser, we suggest that the district court should consider the approach adopted in *Waldron v. British Petroleum Co.*, 231 F. Supp. 72 (S.D.N.Y. 1964). In *Waldron*, the court had to determine whether the plaintiff (who had a written option *contract* to purchase Iranian oil), met the standing requirements of section 4. In analyzing whether the plaintiff had suffered the necessary injury to "business or property" the court summarized the case law in the various circuits as follows:

> In determining whether a plaintiff has proved the requisite intention and preparedness, the courts have looked for *varying combinations* of the following typical elements:
>
> 1. The background and experience of plaintiff in his prospective business . . .
>
> 2. Affirmative action on the part of plaintiff to engage in the proposed business . . .
>
> 3. The ability of plaintiff to finance the business and the purchase of equipment and facilities necessary to engage in the business . . .

> 4. The consummation of contracts by plaintiff . . .

Id. at 81-82 (citations omitted; emphasis supplied.)[4]

We, of course, take no position on the question whether Solinger can support a factual determination that he met the requirements of the intention and preparedness test under the facts of this case. We simply remand the case to the district court for a determination whether summary judgment is appropriate on this issue and again note that the issue whether the plaintiff is a prospective purchaser is factual in nature and seldom presents a situation appropriate for a determination by summary judgment.

VI

The third element that Solinger must show in order to sustain a claim under section 4 is that the loss to his business or property was caused by the alleged antitrust violation. The injury caused by the violation must be one the antitrust laws were designed to protect against. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977). *Cf.* Handler, Changing Trends in Antitrust Doctrines, 77 Columbia L.Rev. 979, 989 to 993.

This Court has generally used the target area approach in order to determine whether a given plaintiff has satisfied the causation element of standing.[5] *Bosse v. Crowell,*

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4. For other cases using the intention and preparedness test, *see Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1976); *Quinonez v. National Assoc. of Securities Dealers, Inc.*, 540 F.2d 824 (5th Cir. 1976); *Woods Exploration & Producing Co., Inc. v. Aluminum Co.*, 438 F.2d 1286 (5th Cir. 1971).

5. The courts have used three different methods in order to determine whether a given plaintiff has satisfied the causation element: the target area approach, the direct injury approach, and the zone of interests approach, the latter of which was recently followed in *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142 (6th

Collier & MacMillan, 565 F.2d 602 (9th Cir. 1977); *John Lenore & Co. v. Olympia Brewing Co.,* 550 F.2d 495 (9th Cir. 1977); *In re Western Liquid Asphalt Cases,* 487 F.2d 191 (9th Cir. 1973); *In re Multi-district Vehicle Air Pollution,* 481 F.2d 122, 129 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973). Under the target area approach the plaintiff must show that he is within the area of the economy that is endangered by a breakdown of competitive conditions. *Conference of Studio Unions v. Loew's, Inc.,* 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952).

Solinger alleged that he has standing to pursue his claims under section 1 and 2 both as a prospective purchaser of I.M.S. and as an employee of that company. He argues that he has standing to recover damages under section 1 of the Sherman Act because of the territorial restrictions imposed by A&M and Motown and under section 2 of the Sherman Act because of the territorial restrictions imposed by A&M and Motown and under section 2 of the Sherman Act because of a series of direct and indirect acquisitions by defendant Transamerica Corporation.

In order to have standing under section 4 when the plaintiff has alleged violations of sections 1 and 2, Solinger must show that the injury occurred within an area of the economy that foreseeably would have been affected by the anti-

Cir. 1975). We have not commented on the zone of interests approach but we have criticized the direct injury test:

> [I]f the claimant is separated from the violation by an intermediate antitrust victim, standing is denied by attaching conclusory labels such as "remote", "indirect", and "consequential". Resurrecting notions of privity, this test thus arbitrarily forecloses otherwise meritorious claims simply because another antitrust victim interfaces the relationship between the claimant and the alleged violator.

In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 127 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973). *Compare:* Sherman, Antitrust Standing: From *Loeb* to *Malamind,* 51 N.Y.U. L.Rev. 375; Conclusion, 405 to 407 (1976).

trust violation alleged. *See, e.g., In re Western Liquid Asphalt Cases,* 487 F.2d 191, 199 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974) (indirect purchaser in the chain of distribution foreseeably injured by price-fixing conspiracy); *Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 109, 220 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964) (held that the plaintiff was within the area of the economy that the defendant could reasonably have foreseen would be affected by the alleged antitrust violations); *Hoopes v. Union Oil Co.,* 374 F.2d 480 (9th Cir. 1967) (lessee's interest in certain property sufficient to allow lessee standing to sue for alleged antitrust violations, despite the fact that the lessor could also have sued, because it was foreseeable that the lessee's interest would be affected.[6]

If Solinger can support a factual determination that he was a prospective purchaser of I.M.S., he almost certainly has standing to pursue a claim against A&M and Motown for any territorial restriction that violates section 1 of the Sherman Act. As a prospective purchaser of a company and a potential new entrant into the market, Solinger allegedly has been foreclosed from entering the market because of A&M's and Motown's anticompetitive refusal to deal with him.[7] He is within the area of the economy that

6. This Court did not use the foreseeability approach in *In re Multidistrict Vehicle Air Pollution,* 481 F.2d 122, 129 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1975) (farmer did not have standing to sue for damages because of automotive antipollution devices, no discussion of foreseeability.) However, the court again used a foreseeability test in *Blankenship v. Hearst Corp.,* 519 F.2d 418 (9th Cir. 1975).

7. A territorial restraint is "a promise by a buyer that he will not sell the goods outside a specified area or to customers who reside or have their place of business outside of that area." Note, Restricted Channels of Distribution under the Sherman Act, 75 Harv. L.Rev. 795, 796 (1962). And *see: Continental T.V., Inc. v. GTE-Sylvania, Inc.,* 433 U.S. 36, (1977), overruling *United States v.*

the defendants should have foreseen would be affected by their violation of the antitrust laws, if any. *In re Multidistrict Vehicle Air Pollution,* 481 F.2d 122, 129 (9th Cir. 1973).

As a prospective purchaser Solinger is also entitled to pursue his claim against Transamerica Corporation under section 2 of the Sherman Act if its acquisitions caused unreasonable barriers to entry. As a potential entrant to the market, Solinger would be within the area of the economy that Transamerica should have foreseen would be affected by proof of its alleged violation of the antitrust laws.

Solinger does not, however, have standing in his capacity as an *employee* of I.M.S. to pursue his claims under section 1. He is not within the area of the economy that the antitrust laws were designed to protect. *See Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477 (1977).[8] His loss of salary was merely incidental to the alleged antitrust violation and was not within the area of the economy that the defendants should have foreseen would be affected by its violation.

A different causation test exists in order to show standing under section 4 of the Clayton Act when a section 7

Arnold Schwinn & Co., 388 U.S. 365 (1967), *Id.* 58. Sylvania "stands in sharp contrast to the *per se* attitudes in *United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972), and *Albrecht v. Herald Co.,* 390 U.S. 145 (1968)" Handler, Changing Trends in Antitrust Doctrines, 75 Columbia L.Rev. 979, 980-988 (1977).

8. Shareholders, officers, and employees of corporations are generally denied standing to sue. *Pitchford v. P.E.P.I. Inc. v. White Motor Corp.,* 521 F.2d 1113 (2d Cir. 1975); *Ash v. International Business Machines, Inc.,* 353 F.2d 491 (3d Cir.), *cert. denied,* 384 U.S. 927 (1975). Note, Sylvania and Vertical Restraints on Distribution, 19 Boston College L.Rev. 751.

violation is alleged.[9] The plaintiff must be a "component of the competitive infrastructure" or a "component of competitive significance." *Bosse v. Crowell, Collier & MacMillan,* 565 F.2d 602, 607 (9th Cir. 1977) (citing *John Lenore & Co. v. Olympia Brewing Co.,* 550 F.2d 495, 500 (9th Cir. 1977)).

9. Although this Court has not so stated, the threshold causation inquiry of the target area test has varied depending upon the type of antitrust violation that is alleged to have caused injury to the plaintiff. In cases in which a section 1 or 2 violation is alleged, the test is whether the antitrust violation is clearly within the area of the economy that the defendants should have or did foresee would be endangered by the breakdown of competitive conditions. *Blankenship v. Hearst Corp.,* 519 F.2d 418 (9th Cir. 1975); *Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 190, 220 (9th Cir.), *cert. denied,* 379 U.S. 880 (1969); *Conference of Studio Unions v. Loew's Inc.,* 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952). When a section 7 violation is alleged, however, the plaintiff must be a "component of the competitive infrastructure" or a "component of competitive significance." *Bosse v. Crowell, Collier & MacMillan,* 565 F.2d 602, 607 (9th Cir. 1977) (citing *John Lenore & Co. v. Olympia Brewing Co.,* 550 F.2d 495, 500 (9th Cir. 1977)). The difference is logical. An antitrust violation occurs under section 7 of the Clayton Act if there is a merger or acquisition that causes substantial lessening of competition or a tendency to monopoly "in any line of commerce in any section of the country." 15 U.S.C. § 18 (1976). Before a private party can be injured directly by the type of violation section 7 was designed to prevent, the party must be an existing competitor in the relevant market. Although others may feel tangential effects of lessening competition, such as raised prices or limited supply, the only immediate injury caused by an illegal merger or acquisition is a lessening of competition and only a competitor could be directly affected. The test for standing that this Court has used for a section 7 violation is designed to allow only those parties who are injured directly to sue. Thus, the statement that a party must be a member of the competitive infrastructure is simply another way of saying that only a competitor within a given market can be injured by a given merger or acquisition and only those parties should have standing to sue.

When a section 1 violation is alleged, however, the scope of parties who can be directly injured by an action that "the antitrust laws are designed to prevent" is much broader. It is not only the competitor who is directly injured. Under section 1 of the Sherman Act, "[e]very contract, combination in the form of trust or other-

In this case Solinger is not a "member of the competitive infrastructure" or a "component of competitive significance" either in his capacity as a prospective purchaser or in his capacity as an employee. He has no standing as a matter of law to pursue his claim under section 7 and the district court's dismissal of this portion of the complaint was proper.

Affirmed in part, reversed in part, and remanded in part.

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wise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1976). The most obvious examples of parties who are not competitors but who are affected by section 1 antitrust violations are those who feel the effects of a secondary boycott and potential competitors who are attempting to enter the market but who are precluded from doing so because of barriers to entry. Individual consumers may be directly affected by an illegal tying arrangement.

Because a party other than a competitor who alleged a section 1 or 2 violation may be within the area of the economy that the antitrust laws are designed to protect, this Court has formulated another test for standing. As discussed in this opinion, the test is foreseeability.